Supreme Court, U.S.
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No. 96-590 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TIMOTHY SCOTT SHERMAN,
Petitioner,

v.

WILLIAM L. SMITH, Warden, Maryland House of Correction-Annex, and JOHN JOSEPH CURRAN, JR., Attorney General for the State of Maryland,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Fourth Circuit properly apply the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to find, as did the district court, that a juror's visit to the area of the crime scene did not warrant the grant of federal habeas corpus relief?

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BRIEF IN OPPOSITION

Respondents, William L. Smith, Warden of the Maryland House of Correction-Annex, and John Joseph Curran, Jr., Attorney General for the State of Maryland, respectfully request that this Court deny Timothy Scott Sherman's petition for writ of certiorari.

OPINIONS AND ORDERS BELOW

Sherman seeks review of the July 17, 1996 judgment of the United States Court of Appeals for the Fourth Circuit affirming the denial of habeas corpus relief by the United States District Court for the District of Maryland (Nickerson, J.). The Fourth Circuit's reported opinion, *Sherman v. Smith*, 89 F.3d 1134 (1996) (en banc), and other opinions and orders relating to the issue presented by Sherman are, with one exception, reproduced as appendices to Sherman's petition. The unreported oral ruling of Judge Cypert O. Whitfill, of the Circuit Court for Harford County, Maryland, denying Sherman's motion for new trial, as that motion pertained to the issue before this Court, is reproduced in Appendix A hereto (1a-2a).

STATEMENT OF JURISDICTION

Sherman invokes the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1254(1) and 2254(a). Jurisdiction is not properly invoked under Section 2254(a), as Sherman has not filed an original application for writ of habeas corpus in this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent constitutional provisions are reproduced in Sherman's petition.

STATEMENT OF THE CASE

At approximately 1:45 a.m. on Monday, October 12, 1987, Harford County Sheriff's deputies found Stevenson and Elizabeth Ann Sherman lying dead in their bed; each had been killed by a shotgun. J.A. 78-80, 84c-84d; Tr. 5/25/88 at 7-18.[1] In the hallway outside the victims' bedroom lay two expired Remington 12-gauge shotgun shells. J.A. 79, 159. There were no signs of forced entry or theft. J.A. 72-77, 127-30. Although there was an extensive alarm system for the doors and windows of the house, the alarm switch inside the house was in the "off" position. J.A. 46m-46q, 46u-46x, 182-84a.

Eighteen-year-old Timothy Sherman, who lived with his parents and whose bedroom was adjacent to theirs, was at the crime scene with his maternal grandfather William Gibson when the deputies arrived. J.A. 79-81. Sherman was fully clothed and sitting quietly on his bed. J.A. 80-81. He said he had been in bed when the shooting occurred and afterward had run to Gibson's house. J.A. 80. Gibson had dressed and returned with his grandson to the Sherman household. J.A. 52. Only after checking the bodies of his daughter and son-in-law and talking to his

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[1] "J.A." refers to the joint appendix in the Fourth Circuit on en banc review, and "Tr." and other references relate to items in the record in the federal district court.

wife by telephone and calling his son-in-law Stuart Robinson did William Gibson alert the authorities to the murders by calling 911. J.A. 52-54.[2]

Michael Gallagher, the first deputy to arrive at the scene, found Sherman's maternal grandmother Erma Gibson at the end of the driveway and Sherman and William Gibson in the house. J.A. 78-82. Gallagher allowed Maryland State Trooper Jerry Scarborough, Steve Sherman's brother-in-law, to view the deceased from the hallway while accompanied by Gallagher. J.A. 82-83; Tr. 6/1/88 at 29-34. Later, Sherman's paternal grandfather Donald Sherman, who had been called at home and told about the murders by William Gibson, viewed the bodies in the company of Gallagher and Gibson. J.A. 54, 83-84. Gallagher then "sealed the hallway off and no one else went down the hallway until the investigators showed up at the scene." J.A. 84.

While his hands were being tested for gunshot primer residue at the scene on Monday morning, Timothy Sherman explained that he had been hunting on Saturday and had been reloading shotgun shells during the immediately preceding Sunday afternoon. J.A. 117-21. Sherman initially identified the shotgun that he had been firing on Saturday as an "870," but then changed his story and said it was an "1100 Remington." J.A. 122. Sherman

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[2] Sherman asserts that the murderer altered the position of the bodies after the killings. *See* Pet. 2, 4. Although the physical evidence indicated that bed clothes and a pillow were moved after death, J.A. 136a, Gibson acknowledged that when checking the bodies "I did probably touch the side of the bed with my knee because I had to reach over Steve to check Ann," J.A. 53.

also said that he had not taken a bath or washed his hands since handling the gun on Saturday afternoon. Tr. 5/31/88 at 47. And he remarked and demonstrated that when firing a shotgun he pulled the trigger with his middle finger and placed his index finger on the metal plate above the trigger guard. J.A. 122-23. Sherman at this time was upset because he felt he was being singled out as a suspect and because he was being prevented from going to the bedroom area of the house. J.A. 121-25.[3]

Officers at the scene on October 12 found a box of Remington 12-gauge shotgun shells under the mattress of Timothy Sherman's bed. J.A. 134-36, 184b. The box was

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[3] The results of the neutron activation test conducted on Sherman's hands were as reported in footnote 3 of Sherman's petition. The absence of gunpowder residue on Sherman should be considered along with the following: (1) a state's expert gave several possible explanations, other than not having fired the murder weapon, why gunshot residue was not found on Sherman, Tr. 5/27/88 at 14-18; (2) the same expert testified to having discharged a weapon seven times only to find significant amounts of barium and antimony one time, *id.* at 17; (3) another state's expert said he would not have expected to find gunpowder residue on the murderer's hands, given the murder weapon's closed bolt and the lack of a gap where residue could be expelled, *id.* at 100; (4) the same expert also testified that he had examined Sherman's clothing for gunpowder, although typically the FBI, his agency, does not do so because only in "an extremely small amount of times" is gunpowder found on a suspect's clothing, *id.* at 78; (5) a defense expert's own experiment, which was intended to show what amount of residue came from the murder weapon's breach, was conducted on a weapon other than the murder weapon and it disclosed little residue, Tr. 6/2/88 at 73-84; Tr. 6/6/88 at 30-32.

designed to hold five shells and contained three shells that matched the two expended shells found outside the victims' bedroom. J.A. 107b-07c, 134-35, 160-61. Sherman states that this box of shells was never submitted for fingerprint testing, and he characterizes that omission as "a classic 'rush to judgment.'" Pet. 4. Sherman is wrong. The box, the unexpended shells, and the matching expended shells were all tested by the FBI and no fingerprints of value were found. Tr. 5/31/88 at 8-10.[4]

Also on October 12, deputies found a 12-gauge shotgun that belonged to the Shermans hidden in a pine tree beside William Gibson's house. J.A. 64-67. This weapon had fired the two shells found in the hallway of the Sherman home. J.A. 160-61c. The three latent fingerprints

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[4] Sherman also says the possibility that someone else put the box of shells under his mattress was far from fantastical, asserting in support that "the Sherman house filled with people in the immediate aftermath of the crime," Pet. 5, and suggesting also, without mentioning his name, that his paternal grandfather Donald Sherman had both the motive and opportunity to kill his son and daughter-in-law, *see id.* & n.6.

Who had access to the immediate area of the crime scene after the murders has been described in the text, *supra*. Furthermore, although Donald Sherman otherwise had ready access to his son's home and was well-acquainted with the alarm system that he helped to install therein, J.A. 46m-49, these circumstances suggest that the evidence Sherman sought to introduce at trial, with an eye toward establishing a motive to kill on his paternal grandfather's part, was, as the Maryland Court of Special Appeals found, "no more than the proverbial 'red herring' dragged across the trail in order to obfuscate the facts," Pet. App. 83a.

recovered from the weapon, including one above the trigger assembly, were those of Timothy Sherman. J.A. 169-70. While at the Sheriff's Department during the morning of Monday, October 12, Sherman said he had purchased a box of shells the day before and had fired his gun two times. J.A. 91-93.

Regarding the gun, Sherman recounts that an expert at trial testified that someone could have used the gun without disturbing prints previously left by Sherman. Pet. 3 n.1. When asked what effect placement of a gloved finger over existing prints would have, that same expert said: "If a gloved fingerprint was placed over an existing fingerprint on that item, I would say it would cause some destruction to the original latent print." Tr. 5/31/88 at 37. The expert also said that he had found no disturbance of Sherman's latent fingerprints. *Id.*

Regarding the gun's hiding place, Sherman tries to suggest that because a large person had trouble removing the gun from the tree, he, being much smaller, would have had greater difficulty hiding the gun therein. *See* Pet. 5. It is equally, if not more, plausible that the retrieving officer needed the assistance of others because he was removing what he believed could be the murder weapon and he wanted to ensure that he did not disturb its condition. The officer's testimony otherwise can be construed as suggesting that he felt his larger size would be a hindrance were he to try to hide the gun in the manner that it had been hidden. J.A. 141.

Sherman was charged with murdering his parents. He asserts that before his parents were murdered he "had never been in trouble with authorities, had no history of mental illness, and had a loving and respectful relationship with his two parents." Pet. 1. Although Sherman's

assertions, read literally, may well be accurate, some tempering is in order. During the fourteen-month period preceding the summer of his senior year in highschool, Sherman underwent counseling with Cathy Kelly, a clinical social worker. Tr. 9/2/88 at 116-35. Kelly offered various observations at Sherman's sentencing hearing, including:

> Tim came from a very supportive family. There was a large network, but I felt there was a problem between he and his mother in that they disagreed often on things like her view and going out with his friends. There were some problems with that or how he conducted himself at home. If he would make any kinds of mistakes around the house, they would argue about who was right and who was wrong many times.
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> * * *
>
> I believe that his mother was very concerned about Tim getting into any kind of trouble. I don't know how that developed, whether it was that Tim, when he was a smaller child before I knew him had given them some difficulty as far as being a mischievous little boy. All I noticed as he became an adolescent, her fear of him getting into any kind of trouble was more than what -- I don't know how to define normal, but it was, she had a greater concern than most of the people that I see that come into the office of parents that -- and I think that this was based on her love for him; that she didn't want him to get into any trouble, and so, therefore, she was very protective of him and made sure that he was pretty closely supervised. . . .

Id. at 119-20, 123. Furthermore, the trial testimony of William Vinson, the father of a friend of Sherman, disclosed that Sherman visited Vinson on the afternoon preceding the murders, ostensibly to deliver early Christmas presents. J.A. 46a-46c. When Vinson asked Sherman how he and his parents were doing, Sherman "said, 'I don't want to talk about it,' and seemed down." J.A. 46e. Vinson had last seen Sherman "really down" after Sherman and Vinson's son had torn down some mailboxes. Tr. 5/23/88 at 71.[5]

After a lengthy jury trial in the Circuit Court for Harford County, with Judge Cypert O. Whitfill presiding, Sherman was found guilty of two counts of first-degree murder. Although the jurors in connection with their service as such received a handbook advising them not to inspect the scene of any event in a case in which they participated, J.A. 237-38, at no time during trial did Judge

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[5] Sherman also mentions that family members have supported him in his claim of innocence. Pet. 1, 4. Although the Maryland Court of Appeals declined to review Sherman's murder convictions, it had this to say in a civil case that arose as a consequence of those convictions:

> Shortly after the murders, when Timothy was arrested, the decedents' families had opposing views concerning Timothy's innocence. Stevenson's parents, Appellants Donald and Irene Sherman (the Shermans), although attempting to withhold judgment until the jury verdict, remained skeptical of Timothy's innocence. The Gibsons, on the other hand, consistently maintained that Timothy was innocent.

Sherman v. Robinson, 319 Md. 445, 447, 573 A.2d 34, 35 (1990).

Whitfill instruct or admonish the jurors not to visit the scene of the events at issue at Sherman's trial.

Shortly after trial, Sherman filed a new trial motion in which he alleged, without explanation, "[t]hat the jurors committed misconduct during the trial and deliberations." Paper 7, Exhibit 4 at 1. Two and one-half months later, on the day of the hearing on Sherman's motion, the prosecution learned for the first time that Sherman was claiming juror misconduct due to juror Blane Miller's having visited the crime scene after trial had begun. J.A. 225-26, 233-34. Prosecutors had interviewed Miller several days before the hearing in connection with a different claim for new trial relief; the visit to the scene was not then disclosed. J.A. 234.

As is proper procedure, *see Rushen v. Spain*, 464 U.S. 114, 119-20 (1983) (per curiam), there was a post-trial hearing to examine the issue of Miller's conduct. Miller, who was called by Sherman to testify at the new trial hearing, recounted that "two or three days into the case" he and his wife drove to the scene after the jury had been dismissed for the evening. J.A. 232. Miller described his activities as follows: "I went to the Sherman house and then I drove back the streets from the Sherman house, back to the entrance of Gibson Manor in looking for a tree that was so involved in the case." J.A. 232. He confirmed having seen both the house and the tree and acknowledged having visited the scene after viewing a videotape of the outside of the Sherman house and pictures of the tree. J.A. 232-33, 238-39. Miller could not remember if his visit occurred after aerial and other photographs of the scene had been shown to the jury. J.A. 238-39. Miller iterated that "the reason why I went there was so I could see the tree that was so much in question." J.A. 239. He

never testified that he had left his car, let alone that he had tested the conditions of the tree in which the murder weapon had been found,[6] and he never testified that he had shared any of his observations with other jurors. J.A. 229-41a.[7] Although asked if he had been given a copy of the juror's handbook before trial, Miller was not asked if, nor did he testify that, he had read the handbook. J.A. 237-38.[8] None of Miller's fellow jurors was called as a witness at the hearing on Sherman's new trial motion. J.A. 224-42.[9]

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[6] Consequently, Sherman's suggestion that the condition of the tree at the time of Miller's visit may have been different than at the time of the crime, thus resulting in misleading impressions, *see* Pet. 5 n.7, presupposes an investigation that Miller never testified occurred.

[7] Sherman's assertion that the trial judge would not permit questioning about why Miller went to the neighborhood of the crime scene, *see* Pet. 7, should not be read to suggest that the trial court impermissibly restricted Sherman's examination of Miller. *See Tanner v. United States*, 483 U.S. 107 (1987); *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 918 (7th Cir. 1991) (collecting cases).

[8] Sherman thus speculates when he says that Miller's violation of the handbook's admonition suggests "a deliberateness born out of necessity rather than mere curiosity." Pet. 7 n.10.

[9] Sherman frequently characterizes juror Miller as having been dissatisfied with the evidence presented in the courtroom, and he repeatedly mentions that Miller discussed his

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In denying new trial relief, Judge Whitfill said:

> As to the matter of Mr. Miller going to the scene, the Defendant had requested a view of the property. My recall of it, I think the record will reflect, what was, in fact, said, was that I believe that it could be dealt with adequately without a view and that that request could be renewed after we had the evidence, the photographic evidence in place. I was satisfied with the videotapes, the photographs, including the aerial photographs, and the description of witnesses that the issue of the scene had been completely covered, and that there was no need for a view as to that issue. In suggesting a view, Counsel had -- Counsel's suggestions were not only the exterior, I think at one point that they were emphasizing the size of the rooms, the close proximity of the Defendant's room to his parents' room, and so that the inside of the house was part of what they were seeking a view as well as the exterior. So there's no question that Mr. Miller had violated instructions which were given about not doing his own investigation.

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[9](...continued)
investigation of the crime scene with fellow jurors. *See* Pet. i, 2, 6, 7. Miller's testimony at the new trial hearing is consistent with the notion that his trip to the crime scene was prompted by idle curiosity, and that testimony in nowise indicates that Miller discussed what he saw with other jurors. As discussed *infra*, the support for the motive and conduct that Sherman ascribes to Miller is an affidavit executed by an alternate juror only after a United States Magistrate Judge recommended denial of habeas corpus relief in connection with Sherman's instant claim.

> However, I'm convinced that I denied the view, not because I felt that any significant information would come about, but I felt it would be a waste of time and expense to take the jury out there because I felt the issue was fully covered. So that I think that that activity is not of such magnitude as to warrant a new trial or reversible appeal.

Br. in Opp. App. 2a.[10]

Following the denial of new trial relief, Judge Whitfill ordered Sherman to serve consecutive life terms for the murders. Tr. 9/2/88 at 157. In footnote 9 of his petition, Sherman discusses circumstances surrounding the jury's verdict that have been rejected by other courts as grounds for post-trial relief and then ends the discussion by alluding to comments the trial court made to juror Miller at the new trial hearing, i.e., "I acknowledge it was a difficult trial. It was a very emotional trial. I suspect there may have been no more difficult decision to call upon in this County to make." J.A. 239g. The trial judge's remarks later the same day at sentencing are far more telling:

> You have had a trial by a jury of your peers, and this jury has said that you're guilty. I quite frankly must act on the basis of what the jury did. I'm not in a position -- if I believed that you were innocent, I

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[10] Sherman says that Judge Whitfill never acknowledged that a constitutional violation occurred or demanded that the State prove harmless error. *See* Pet. 8. The Fourth Circuit noted in this regard that "[s]tate courts have no obligation to use particular language in considering claims presented in their courts." Pet. App. 12a (citing *Coleman v. Thompson*, 501 U.S. 722, 739 (1991).

would grant you a new trial. I quite frankly do not believe that you're innocent. I think that you stood there with that shotgun. I think that you fired that shotgun; that you killed your father, and that you fired that second shot that killed your mother, and I have not only waited for a jury to reach a verdict, but I have had a chance to review the evidence to see whether or not the verdict was consistent with my judgment, and I think that, I am convinced beyond a reasonable doubt and to a moral certainty of your guilty, and I will be acting accordingly.

. . . I don't think that the average human mind can accept the idea that a child can kill a parent with a shotgun or otherwise. The human mind rebels against the idea. Yet the reality is it happens. It has happened in this age. We know historically, we can go back to Greek mythology and it was dealt with as an issue, so it's not new even though it is difficult to accept.

I heard you described as a fine young man, but I also heard a number of problems discussed of which I feel the most significant is that you lived in a very tight closed network. I think that you were protected too much. I think that there was only one way out of that tight network, and that was a shotgun, and that's the reason why you did it.

Tr. 9/2/88 at 156-57.

On direct appeal to the Court of Special Appeals of Maryland, Sherman attacked the trial court's failure to grant a new trial based on Miller's conduct, claiming, inter alia, that the trial court had abused its discretion in denying the new trial motion and that Miller's site visit could be analyzed for, but was not, harmless error. Paper

7, Exhibits 8 & 9. In the course of so arguing, Sherman characterized Miller's conduct as violative of the juror's oath and the court's instructions regarding the evidence and sequestration. Paper 7, Exhibit 8. The Court of Special Appeals of Maryland declined to grant relief, saying:

> Sherman argues that the trial court should have granted a new trial because a juror and wife drove to the neighborhood of the murder scene.
>
> When the precise extraneous matter is known but direct evidence as to its effect on the deliberations is not, "a sound balance is struck by a rule which looks to the probability of prejudice from the fact of extraneous matter in relation to the circumstances of the particular case." *Wernsing v. General Motors Corp.*, 298 Md. 406, 419-20 (1984). When ruling on a motion for new trial, the judge must evaluate the degree of probable prejudice to the defendant in order to discern whether a new trial is justified. *Wernsing* at 420.
>
> The grant or denial of a motion for new trial rests within the sound discretion of the trial judge. *Eades v. State*, 75 Md. App. 411, 419-20 (1988). Judge Whitfill found that a new trial was not warranted, particularly in light of the numerous testimonial references, videotapes, and photographs relating to and depicting the crime scene. We perceive no abuse of discretion in that ruling.
>
> Sherman next alleges that there was a violation of the sequestration order because of the fact that the juror was accompanied by the juror's wife when he visited the crime scene. Sherman asserts that conduct mandates reversal. Sherman's bald

> averment fails to indicate how the juror's improper action prejudiced the case.

Pet. App. 86a.[11]

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[11] Sherman suggests that the Maryland Court of Special Appeals looked only to a state civil case in rejecting as harmless error Sherman's claim of juror misconduct. *See* Pet. 8. Although its decision as it relates to Sherman's instant claim is terse, the Court of Special Appeals' citation to *Eades v. State*, 75 Md. App. 411, 541 A.2d 1001, *cert. denied*, 313 Md. 611, 547 A.2d 188 (1988), a criminal case, demonstrates that the court properly analyzed, albeit implicitly, the issue before it. In *Eades*, which was decided less than a year before Sherman's case, the Court of Special Appeals had engaged in a comprehensive review of extant law pertaining to juror misconduct and extraneous influences on the jury. *Id.* at 416-25, 541 A.2d at 1004-08. In recognizing that a motion for a new trial is committed to the sound discretion of the trial judge, the Court of Special Appeals also acknowledged that, where misconduct is at issue,

> the trial judge must account for the fact that due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."

Id. at 420, 541 A.2d at 1006 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). The court also acknowledged that a new trial motion based on alleged jury misconduct "will be granted if the misconduct was such as to indicate that a fair and impartial trial could not be had under the circumstances." *Id.*, 541 A.2d at 1006. All of the above-quoted language appears on the pages of the *Eades* opinion that the court refers to in its

(continued...)

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[11](...continued)
decision in Sherman's case. Pet. App. 86a.

In *Eades*, where a juror had asked her lawyer-husband about a comment of the trial judge, the Court of Special Appeals went on to discuss various standards that had been used by different courts to determine whether prejudice had resulted when an irregularity had occurred. It ultimately assumed that this Court's holding in *Remmer v. United States*, 347 U.S. 227 (1954), "as to the presumptively prejudicial effect of any private communication with a juror concerning a matter pending before the jury remains the law." 75 Md. App. at 423, 541 A.2d at 1008. In a subsequent discussion regarding which party bears the burden when the problem of improper juror contact is raised, the court again assumed that it is the State that bears the burden of establishing the harmlessness of the contact beyond a reasonable doubt. *Id.* at 425-26 n. 4, 541 A.2d at 1008-09 n. 4.

Although the Court of Special Appeals did not, in its decision of Sherman's case, expressly refer to the standards it had applied in *Eades*, it is reasonable to believe that the court was aware of those standards and that it considered them in conjunction with the language regarding "the degree of probable prejudice" that it quoted from Maryland's high court's decision in *Wernsing v. General Motors Corp.*, 298 Md. 406, 419-20, 470 A.2d 802, 809 (1984). Consequently, it is *not* reasonable to believe, as Sherman suggests in his petition, that the Court of Special Appeals imposed a burden upon him to prove that he had been prejudiced. Indeed, the Court of Special Appeals' reliance upon *Eades* and *Wernsing* suggests that the court affirmed the trial court's denial of Sherman's new trial motion only after it was persuaded that the State had established that probable prejudice to Sherman had not occurred beyond a

(continued...)

The Court of Appeals of Maryland and this Court, with Justices White and Marshall dissenting, declined to review Sherman's complaint about juror Miller's crime scene visit. Pet. App. 78a-79a. After also being denied state post conviction relief based on claims raising matters other than Miller's site visit, Sherman filed a petition for federal habeas corpus relief on grounds that included Miller's conduct.

In a Report and Recommendation filed on February 13, 1992, Chief United States Magistrate Judge Clarence E. Goetz recommended that habeas relief be denied. Pet. App. 70a-77a. Insofar as Sherman's claim respecting Blane Miller's crime scene visit was concerned, Magistrate Judge Goetz viewed Sherman as arguing that juror Miller's conduct generated "a presumption of jury taint and that the government must carry the burden of proving that the effect of his action was harmless." Pet. App. 76a. Magistrate Judge Goetz concluded that juror Miller's conduct had not resulted in the jury's having been exposed to extrinsic evidence that had a reasonable possibility of influencing its verdict. Pet. App. 76a-77a.

Eight days later, alternate juror Anthony DelFrate signed an affidavit in which he recounted that Blane Miller had said, while in the jury room during a break in trial and while other jurors were present, that he had driven to the development where the Shermans lived because he had wanted to see the layout of the entire area "so that everything would be clearer in his mind" and

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[11](...continued)
reasonable doubt.

because "he was not satisfied with the photographs of the tree." J.A. 256-57. DelFrate's affidavit was filed in the district court as part of Sherman's Objection to Magistrate Judge Goetz's Report and Recommendation. Paper 13, Exhibit 1. Respondents have repeatedly argued that the DelFrate affidavit is not a proper subject of review by the federal courts. *E.g.*, Pet. App. 56a n4. On August 20, 1992, Senior District Judge Joseph C. Howard ordered that Chief Magistrate Judge Goetz's Report and Recommendation be adopted and that Sherman's petition for habeas corpus relief be denied. Pet. App. 69a.

Sherman appealed to the United States Court of Appeals for the Fourth Circuit, and in an unpublished per curiam opinion decided October 27, 1993, *Sherman v. Smith*, No. 92-6947, a three-judge panel, with Circuit Judge Phillips concurring in part and concurring in the judgment, vacated the district court's order and remanded for further proceedings. Pet. App. 59a-68a. The court looked in part to the decision of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which had issued shortly before oral argument, to conclude that, in assessing juror Miller's conduct, the district court had

> erred in not reviewing the entire record *de novo* to answer questions as to the nature of the error--structural or trial--and whether it was technical or not, and, depending on the answers to those queries, whether the error influenced the jury's deliberations, with the burden on prosecutors to explain why trial errors were harmless . . . .

Pet. App. 64a.

On remand the case was reassigned to District Judge William M. Nickerson, who permitted the filing of supplemental pleadings and oral argument by counsel for

the parties. By Memorandum dated July 8, 1994, Judge Nickerson rejected Sherman's claim that juror Miller's crime scene visit constituted structural error requiring automatic reversal of Sherman's convictions, and he applied the harmless error standard of *Brecht v. Abrahamson* to find that Miller's visit to the crime scene "did not have a 'substantial and injurious effect or influence in determining the jury's verdict.'" Pet. App. 53a-58a.

In an unpublished per curiam opinion decided December 4, 1995, *Sherman v. Smith*, No. 94-6831, a three-judge panel of the Fourth Circuit, with Circuit Judge Wilkinson dissenting, concluded that juror Miller's conduct was not harmless error. Pet. App. 42a-46a. In granting habeas relief, the majority found it unnecessary to investigate whether juror Miller's conduct constituted structural error, and it relied heavily on information that was never presented to the state courts, that is, information gleaned from the affidavit of the alternate juror that was prepared in the wake of a recommendation that habeas relief be denied. Pet. App. 43-46a.

On Respondents' petition, the Fourth Circuit granted en banc review. In a reported opinion decided July 17, 1996, Chief Judge Wilkinson, writing for nine members of the court, "assume[d] for purposes of argument that juror Miller's site visit amounted to a constitutional violation of Sherman's rights," Pet. App. 4a, and went on to conclude, based in large part on caselaw of this Court, that juror Miller's conduct was amenable to harmless error analysis, Pet. App. 4a-10c. The majority concluded also that the harmless error standard to be applied was that of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), not that of *Chapman v. California*, 386 U.S. 18 (1967). Pet. App. 10a-12a.

And the majority determined that juror Miller's conduct was harmless error. Pet. App. 12a-15a. In this regard, the majority concluded, as had District Judge Nickerson and the Maryland trial and appellate courts, that whatever juror Miller may have observed was cumulative of the abundant evidence about the crime scene that was admitted at trial. Pet. App. 12a-14a. The majority looked also to what it characterized as "the powerful evidence at trial from which the jury concluded that Sherman killed his mother and stepfather." Pet. App. 14a; *id.* at 14a-15a.

Circuit Judge Murnaghan, writing for himself and two other judges, disagreed with the majority's assessment of harmlessness, but also concluded, in reliance in part upon *United States v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996), that a juror's independent and unauthorized gathering of evidence constitutes structural error. Pet. App. 15a-30a. Circuit Judge Motz, in dissent, found herself bound, in light of precedent of this Court and the Fourth Circuit, to treat juror Miller's conduct as trial error. Pet. App. 30-36a. "Without any evidence of the details of the juror's site visit," Judge Motz found herself in equipoise as to the harmlessness of the error and thus compelled by *O'Neal v. McAninch*, 115 S. Ct. 992 (1995), to resolve the issue in Sherman's favor. Pet. App. 41a. Like the majority, Judge Motz agreed that the *Brecht* standard of harmless error applies on collateral review. Pet. App. 36a n.23.

REASONS FOR DENYING THE WRIT

In complete keeping with decisions of this Court, the Fourth Circuit concluded that, if of constitutional magnitude, juror Miller's visit to the neighborhood of the crime scene was trial error amenable to review under the

harmless error standard of *Brecht v. Abrahamson*. Fairly construing the evidence pertaining to Miller's crime scene visit and the evidence adduced at trial, and in complete keeping with *Brecht v. Abrahamson*, the Fourth Circuit determined that Miller's conduct constituted harmless error. Consequently, notwithstanding the several conflicts that Sherman posits, review by this Court is unnecessary. Indeed, review of Sherman's case ultimately would entail nothing more than application of settled law to the facts of this particular case, an exercise that already has been properly conducted by the Fourth Circuit, District Judge Nickerson, and the state courts. Essentially for the same reasons, denial of Sherman's petition is also warranted when the issue presented is considered in the light of the principle of nonretroactivity.[12]

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[12] In a footnote at the outset of its opinion, the Fourth Circuit majority took note of the fact that the Antiterrorism and Effective Death Penalty Act of 1996 has amended 28 U.S.C. § 2254 "to require federal courts to defer to state court legal determinations." Pet. App. 12a n.1. The majority further noted that because it was affirming the district court "we have no occassion to address whatever additional hurdles Sherman might face under the Act." Although a conflict currently exists as to the applicability of the Act to pending cases, *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc) (applying amended Section 2254(d) in pending case) (petition for certiorari filed U.S. Oct. 10, 1996) (No. 96-6298); *Boria v. Keane*, 90 F.3d 36 (2d Cir. 1996) (per curiam) (declining to apply Act in pending case), *petition for certiorari filed*, 65 U.S.L.W. 3342 (U.S. Oct. 11, 1996) (No. 96-628), resolution of that conflict in favor of the Seventh Circuit's position would

(continued...)

I.

SHERMAN'S CLAIM THAT JUROR MILLER'S CONDUCT CONSTITUTES STRUCTURAL ERROR DOES NOT WARRANT REVIEW BECAUSE IT IS WITHOUT MERIT AND OTHERWISE FORECLOSED BY THE PRINCIPLE OF NONRETROACTIVITY.

Notwithstanding that he asked the Maryland Court of Special Appeals on direct review to assess juror Miller's conduct under the harmless error standard of *Chapman v. California*, *see* Paper 7, Exhibit 8, Sherman now asks this Court to use his case as a vehicle to say that conduct like Miller's, which Sherman suggests is a recurring problem, can never be harmless error because it constitutes structural error. Sherman posits a conflict among a few lower courts and error by the Fourth Circuit as grounds for review. This Court should not be persuaded by Sherman's argument for any of at least three reasons.

First, Sherman is simply wrong in his view that juror Miller's conduct involves a structural error. By way of the general principles they espouse and the other cases and examples they discuss, this Court's decisions of *Arizona v. Fulminante*, 499 U.S. 279 (1991), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), stand as firm support for the Fourth Circuit's determination that conduct such as

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[12](...continued)
provide an additional basis for affirming the lower courts' denial of habeas relief in Sherman's case.

Miller's, if error of constitutional dimension, is not structural error. This Court's decisions in *United States v. Olano*, [illegible] U.S. 725 (1993); *Rushen v. Spain*, 464 U.S. 114 (1993) (per curiam); *Smith v. Phillips*, 455 U.S. 209 (1982); and *Remmer v. United States*, 347 U.S. 227 (1954), also compel the Fourth Circuit's conclusion that juror Miller's conduct was not structural error.

Second, consistent with its view that juror Miller's conduct does not constitute structural error under this Court's extant caselaw, Respondents assert, admittedly for the first time, that to say that juror Miller's conduct is structural error would be to create a new rule of law, the application of which to Sherman's case is precluded by the principle of nonretroactivity applicable in federal habeas corpus cases. *See, e.g., Gray v. Netherland*, 116 S. Ct. 2074, 2083-85 (1996); *Caspari v. Bohlen*, 114 S. Ct. 948, 953-57 (1994). Indeed, the fact that Sherman asserts the existence of a conflict as a ground for review and the fact that he did not present a claim of per se error in the Maryland Court of Special Appeals on direct review are strong indicia that Sherman advocates a new rule of law for his case.

Finally, the conflict posited by Sherman does not compel consideration of Sherman's case. The state court decisions cited by Sherman reflect a minority view. *See generally* Christopher H. Hall, Annotation, *Unauthorized View of Premises by Juror or Jury in Criminal Cases as Ground for Reversal, New Trial, or Mistrial*, 50 A.L.R. 4th 995 (1986 & 1996 Supp.) (collecting cases). Furthermore, very recently this Court, in *California v. Roy*, 117 S. Ct. 337 (1996) (per curiam), found the Ninth Circuit's view of structural error in a case other than that cited by Sherman to be wrong.

II.

SHERMAN'S CLAIM THAT JUROR MILLER'S CONDUCT SHOULD BE ASSESSED UNDER THE HARMLESS ERROR STANDARD OF *CHAPMAN V. CALIFORNIA* IS WITHOUT MERIT.

Sherman believes that review of his case is warranted for the additional reason that the Fourth Circuit, unlike the Eighth Circuit, has determined that the harmless error analysis of *Brecht v. Abrahamson* is to be applied to all cases on collateral review regardless of the harmless error analysis used by the state court. The conflict asserted by Sherman notwithstanding, review of Sherman's claim in this regard is inappropriate for at least two reasons.

First, the Fourth Circuit's decision to apply the *Brecht* harmless error standard is fully consistent with *Brecht* and the principles of finality, comity, and uniformity that informed that decision. Sherman's proposed rule--that different standards of harmlessness apply depending upon how a state court has assessed a particular claim (or is perceived as having assessed a particular claim)--would, as the Fourth Circuit aptly concluded, "prove to be confusing and inequitable." Pet. App. 12a.

Second, Sherman's premise for why the *Chapman* harmless error standard should be applied on collateral review in his case is unfounded. Neither the trial court nor the Maryland Court of Special Appeals erred in assessing the harmlessness of juror Miller's conduct. *See* Statement of the Case, *supra*.

III.

SHERMAN'S CLAIM THAT JUROR MILLER'S CONDUCT WAS NOT HARMLESS ERROR CALLS FOR AN APPLICATION OF LAW TO FACTS THAT HAS BEEN PROPERLY CONDUCTED BY THE LOWER FEDERAL COURTS.

Sherman would also have this Court review his case so as to decide for itself whether juror Miller's conduct constituted harmless error. This harmless error inquiry would entail nothing more than application of the *Brecht* standard to the facts of this particular case, an analysis already conducted by two lower federal courts with the same result. This circumstance alone supports denial of Sherman's petition. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317 n.5 (1985) (noting this Court's reluctance to disturb findings of fact in which two lower courts have concurred). That the lower federal courts reached the correct result on the merits of Sherman's claim, *see* Pet. App. 12a-15a, 54a-58a; Statement of the Case, *supra*, is yet an additional reason to decline review.

CONCLUSION

For the foregoing reasons, Respondents Smith and Curran respectfully request that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

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**Counsel of Record*

December 13, 1996

APPENDIX

APPENDIX A

[Excerpt from September 2, 1988 oral ruling of Judge Cypert O. Whitfill denying Sherman's new trial motion]

[S-1]

STATE OF MARYLAND	IN THE CIRCUIT COURT FOR HARFORD COUNTY
vs.	
TIMOTHY SCOTT SHERMAN	CRIMINAL CASE NO. 87C0485
Defendant	Sentencing Date: 9-2-88

_____/

BEFORE: HONORABLE CYPERT O. WHITFILL, Judge

APPEARANCES:

HAROLD I. GLASER, ESQUIRE
STUART JAY ROBINSON, ESQUIRE
On behalf of the Defendant

JOSEPH I. CASSILLY, ESQUIRE
JOSEPH P. MEADOWS, ESQUIRE
On behalf of the State of Maryland

Reported by:
LARRY H. DELP, C.S.R.
Courthouse
Bel Air, Maryland 21014

* * *

[S-63]

* * *

As to the matter of Mr. Miller going to the scene, the Defendant had requested a view of the property. My recall of it, I think the record will reflect, what was, in fact, said, was that I believe that it could be dealt with adequately without a view and that that request could be renewed after we had the evidence, the photographic evidence in place. I was satisfied with the videotapes, the photographs, including [S-64] the aerial photographs, and the description of witnesses that the issue of the scene had been completely covered, and that there was no need for a view as to that issue. In suggesting a view, Counsel had -- Counsel's suggestions were not only the exterior, I think at one point that they were emphasizing the size of the rooms, the close proximity of the Defendant's room to his parents' room, and so that the inside of the house was part of what they were seeking a view as well as the exterior. So there's no question that Mr. Miller had violated instructions which were given about not doing his own investigation. However, I'm convinced that I denied the view, not because I felt that any significant information would come about, but I felt it would be a waste of time and expense to take the jury out there because I felt the issue was fully covered. So that I think that that activity is not of such magnitude as to warrant a new trial or reversible appeal.

* * *